

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERRY SUZANNE DUNN,

Defendant-Appellant.

UNPUBLISHED

December 22, 2020

No. 354179

Berrien Circuit Court

LC No. 2019-015394-FH

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In this expedited appeal¹ on remand from our Supreme Court to consider as on leave granted, defendant appeals the trial court’s denial to appoint appellate counsel on the basis of the trial court’s finding that she was not indigent. We reverse the trial court’s denial to appoint appellate counsel and remand for entry of an order appointing appellate counsel with an extension of the 42-day rule under MCR 7.204(A)(2) to allow defendant’s appeal to proceed as of right.

In May 2019, defendant completed a request for court-appointed counsel after she was charged with embezzlement, MCL 750.174a(4)(a). Defendant detailed in her request that she had no income but received \$750 from social security per month and paid \$550 in monthly rent. On this basis, the trial court appointed defendant defense counsel. In October 2019, a jury convicted defendant. On December 9, 2019, the trial court sentenced defendant to 180 days’ jail with credit for three days served, and five years’ probation. During sentencing, the trial court informed defendant that she could appeal her conviction and sentence within 42 days and defendant acknowledged receipt of this notice by initialing the “Notice of Right to Appellate Review and Request for Appointment of Attorney” form that she was provided at sentencing.

¹ *People v Dunn*, __ Mich __; 946 NW2d 782 (2020). We initially denied defendant’s application for leave to appeal. See *People v Dunn*, unpublished order of the Court of Appeals, entered July 29, 2020 (Docket No. 354179).

On December 11, 2019, defendant returned the form to the trial court. However, only the signature and date portion were completed under the heading “Request for Appointment of Attorney.” The remainder of the form, which required information about defendant’s residence, marital status, employer, length of employment, income, and assets, was blank. On December 12, 2019, before the trial court ruled on defendant’s request for appellate counsel, defendant was arraigned for a probation violation. She completed a request for court-appointed counsel for the probation violation, again indicating that her only income was Social Security benefits and that she paid \$550 in rent. The trial court appointed defense counsel, finding that defendant was indigent.

Thereafter, on January 16, 2020, the trial court entered an order denying defendant’s request for appellate counsel in relation to her December 11, 2019 request. The trial court denied defendant’s request, indicating that defendant was not indigent. On January 30, 2020, defendant filed a second request for appointment of appellate counsel. This time, defendant completed the form, which showed that she was in jail and had no home, was separated, was unemployed, and had no other income, assets, obligations, or debts. The trial court received this completed form on February 7, 2020, and entered an order appointing defendant appellate counsel on March 2, 2020. However, the delay between December 11, 2019 and February 7, 2020, caused defendant’s claim of appeal to change from one as of right to one by leave. See MCR 7.203(B)(5); MCR 7.204(A)(2)(b).² This appeal followed, challenging the trial court’s initial denial to appoint appellate counsel on January 16, 2020.

On appeal, defendant argues that the trial court clearly erred by denying her request for appointment of appellate counsel because the trial court’s finding that she was not indigent was erroneous. We agree.

“A trial court’s factual findings are reviewed for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citations omitted).

MCL 770.3(1)(b) provides an aggrieved party a right to appeal from a felony or misdemeanor conviction. See also Const 1963, art 1, § 20 (“[T]he accused shall have the right . . . to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court[.]”). MCR 7.204(A)(2)(c) states that “[a]n appeal of right in a criminal case must be taken . . . within 42 days after entry of the judgment or order appealed from.” Regarding the applicable procedure after a defendant is convicted and sentenced, MCR 6.425(F) provides in pertinent part:

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

² The trial court also denied defendant’s later motion to restore her appeal as of right.

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be filed within 42 days after sentencing.

Furthermore, pursuant to MCR 6.425(G)(1)(e):

In a case involving a conviction following a trial, if the defendant's request for a lawyer was filed within the time for filing a claim of appeal, the order must be entered on an approved form entitled "Claim of Appeal and Appointment of Counsel." Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

In this case, a jury convicted defendant on October 23, 2019, and the trial court sentenced defendant on December 9, 2019. After the trial court imposed sentence, it provided defendant a Notice of Right to Appellate Review and Request for Appointment of Attorney form. However, the trial court failed to advise defendant, on the record as is required by MCR 6.425(F), that the trial court would appoint a lawyer to represent defendant on appeal if she was financially unable to retain a lawyer and that the request for a lawyer must be filed with 42 days after sentencing. Despite the trial court's failure to advise defendant regarding appointment of appellate counsel, defendant nonetheless signed, dated, and returned the Request for Appointment of Attorney portion to the trial court on December 11, 2019. Admittedly, defendant did not complete the Request for Appointment of Attorney portion of the form, i.e., she left blank information about her residence, marital status, employer information, income, assets, and other obligations/debts. But, defendant had on two separate occasions filled out forms with her financial information indicating that Social Security benefits were her only source of income.

Indeed, the trial court found on two separate occasions—May 6, 2019 (before her appellate right arose) and December 12, 2019 (after her appellate right arose)—that defendant was indigent and appointed her defense counsel. Therefore, by the time the trial court entered its January 16, 2020 order denying defendant's request for the appointment of appellate counsel, it was well aware that defendant was in fact indigent despite defendant's failure to complete the form. Defendant's indigency was well established in the record, and there appears to be no other reason for the trial court's denial to appoint appellate counsel other than its erroneous finding that defendant was not indigent.³ We conclude that defendant's failure to complete the form when her indigency was well documented in the record does not relieve the trial court of its duty to make appropriate findings. "[A]n indigent defendant is entitled to the appointment of counsel . . ." *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000).

From a totality of the facts and circumstances presented by this record, it is abundantly clear that defendant, within the time permitted for appeal as of right, desired post-conviction relief and that appointed counsel was essential to a timely and proper securement of those rights."

³ Because "it is axiomatic that a court speaks through its orders," there was only one finding that the trial court's denial relied upon. *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971).

People v McKinley, 383 Mich 529, 538; 176 NW2d 406 (1970). The trial court thus erred in denying defendant's request.

This error was compounded by the fact that the trial court's initial denial required defendant to file a new request for the appointment of appellant counsel on February 7, 2020, which was then untimely because it was filed outside the 42-day limit of the December 9, 2019 judgment of sentence. The denial of defendant's request thus changed defendant's appeal from one as of right to one by leave. See MCR 7.204(A)(2)(b) ("An appeal of right in a criminal case must be taken . . . within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(G)(1)"); MCR 7.203(B)(5) ("The court may grant leave to appeal from . . . any judgment or order when an appeal of right could have been taken but was not timely filed"). Consequently, because of the trial court's error to comply with MCR 6.425(F) and its erroneous finding that defendant was not indigent, we reverse the trial court's order denying defendant's request for appellate counsel, and we remand for entry of an order appointing appellate counsel with a restart of the 42 days in which defendant can file an appeal as of right.⁴

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Deborah A. Servitto

⁴ We need not address defendant's constitutional issues as we resolved the claim on different grounds. See *People v Jackson*, 487 Mich 783, 801; 790 NW2d 340 (2010) (holding that "courts should not grapple with finding a constitutional question when the case can be decided on other grounds").